B.C.D. 06-8

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EMPLOYER STATUS DETERMINATION
Pawnee Transloading Company, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Pawnee Transloading Company, Inc., as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding Pawnee was provided by Jo A. DeRoche, counsel for Pawnee, in a statement certified to be accurate by Raquel Swan, Assistant Secretary, Executive Vice President, Illinois Region, Chicago & Illinois Midland (I&M), an employer under the Acts (BA No. 2366). I&M is owned by Genesee & Wyoming, Inc., the parent company of Pawnee.

In a Board coverage decision dated February 2, 2001 (B.C.D. 01-17), a majority of the Board held that LeGere Investors, Inc., was not a covered employer under the Acts. LeGere had coal conveyor operating and maintenance agreements with Kincaid Generation, LLC, and Reed Minerals. Additionally, LeGere operated a coal unloading facility. LeGere subcontracted with I&M to continue to provide management services for the operation of the facilities. LeGere reported that it had three permanent employees and hired temporary employees as needed for the unloading functions. Under the contract between LeGere and I&M, I&M was responsible for all capital improvements needed and for maintaining specified liability insurance coverage. I&M received a monthly fee based on the quantity of coal unloaded. LeGere leased locomotives from I&M, as well as the land where the facility is located and track which provides access to the facility. LeGere employees moved rail cars containing coal and slag to the unloading facility and transload location, where they unloaded them. LeGere unloaded coal for Kincaid Generation, LLC, and slag for Reed Mineral.

On December 29, 2004, Pawnee purchased the assets of LeGere and, since that date, has performed the same operations as did LeGere.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Pawnee clearly is not a carrier by rail. Pawnee concedes that it is under common control with a rail employer: as mentioned above, both Pawnee and I&M are owned by Genesee & Wyoming, Inc. The issue in this case, therefore, is whether Pawnee is providing services in connection with rail transportation.

Pawnee argues that it is not providing services for its affiliate carrier, I&M; that the services it provides are for Reed and Kincaid, which would have to provide those services themselves, if Pawnee did not.

A majority of the Board disagrees with this analysis. Pawnee essentially unloads coal in connection with the transfer of coal between I&M and the two companies. Although, as Pawnee contends, the two companies could themselves unload the coal if Pawnee did not, so could I&M, which could then charge the two companies for this service. In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F.2d 507 (D.C.Cir. 1945), aff'd 326 U.S. 446, 90 L.Ed. 192, 66 S.Ct. 238 (1946), the Court of Appeals held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and was therefore an employer under the Railroad Unemployment Insurance Act. The Court of Appeals quoted from the opinion of the Railroad Retirement Board, which had held that Duquesne was an employer under the Act:

> In light of the general purpose of the * * * [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are

> closely related to, the rail transportation system of a carrier and as including within its coverage (I) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public such as auxiliary bus transportation, dining facilities, and incidental warehousing services.
>
> We agree with the Board's construction of the Act. It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i.e., to cover the business of railroading as it is actually carried on. (Footnote omitted.) 149 F.2d at 509.

A majority of the Board believes that the instant case falls within the rationale set out in Duquesne Warehouse Co., above. Pawnee is participating in the transit of coal from its affiliate carrier to the carrier's customers. More specifically, Pawnee unloads coal for Kincaid Generation, LLC and unloads slag for Reed Minerals. The unloading is from railroad cars of Pawnee's affiliate, I&M. The Supreme Court found in the Duquesne Warehouse case more than a half century ago that loading and unloading services are services performed in connection with the transportation of property by railroad. That holding applies to Pawnee's operations. See also Interstate Quality Reloads v. Railroad Retirement Board, 83 F.3d 1463 (D.C. Cir. 1996).

Pawnee cites a number of Board coverage decisions in support of its contention that it is not covered, including GWI Switching, L.P. (B.C.D. No. 94-113), and Great Miami Incorporated (B.C.D. No. 94-105). Both of those decisions involved switching railroads, each of which performed services for a private company and which were, therefore, private carriers.

Pawnee also cites the Board's decision, In the Matter of CSX Intermodal, Inc., B.C.D. 96-82, which relied on four factors to determine whether an affiliate is providing a service in connection with railroad transportation. The first factor is

the physical relation of the affiliate's operation to the rail operation. Pawnee states that, "although part of I&M's rail property and the property of Pawnee are located adjacent to each other, Pawnee employees perform no work for the railroad. Railroad crews bring coal and slag trains from Powerton and spot them at Pawnee's delivery track, thereby completing the common carrier movement. As agent for the power company, Pawnee then unloads the coal and provides maintenance on the unloading facility."

The second criterion is the history and origin of the affiliate. Pawnee notes that none of the predecessors of Pawnee has been considered to be an employer under the Acts. The third criterion is for whose benefit the affiliate's services are performed. Pawnee contends that it operates for the benefit of its customers, Kincaid and Reed, who otherwise would have to perform the unloading themselves. The fourth criterion is the amount of the affiliate's business with the public. Pawnee contends that all of its business is non-carrier.

A majority of the Board disagrees with Pawnee's proposed application of the criteria in the CSX Intermodal decision. The Board believes that, under the criteria specified in the CSX Intermodal decision, Pawnee is performing services in connection with rail transportation. With respect to the first criteria, Pawnee unloads rail cars which are delivered to it on property adjacent to I&M's right of way. Although none of Pawnee's predecessors which performed these services were covered under the Acts, none of those companies was under common control with I&M.

Turning to the second criteria (the history and origin of the affiliate), we note that Pawnee was formed for the purpose of acquiring the assets of its predecessor, LeGere, whose primary business was the operation of a coal unloading facility at Kincaid, Illinois, where it unloaded coal from railroad cars onto a conveyor system that serves the Kincaid Station Power Plant owned by Kincaid Generation, LLC. In essence, Pawnee operates for the benefit of its affiliate railroad (I&M) as part of the delivery mechanism to deliver shipments from the railroad to its customers.

In the CSX Intermodal decision, the criterion concerning the amount of business being performed for the public is described as being intended to measure a company's sales of products and services to its carrier affiliate compared to its sales to nonrailroads and to other carriers. The unloading service being performed by Pawnee is being performed entirely between its affiliate carrier,

I&M, and Kincaid and Reed. There is no service being performed by Pawnee for the public which does not involve I&M. Thus, a majority of the Board finds that the application of the third and fourth criteria of the CSX Intermodal decision to this case also support a finding that Pawnee provides service in connection with railroad transportation.

Accordingly, it is determined that Pawnee is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of December 29, 2004, the date as of which Pawnee purchased the assets of LeGere and began performing the operations described above.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting opinion attached)

Management Member's Dissent

Employer Status Determination
Pawnee Transloading Company, Inc.
Docket Number 05-CO-0043

January 31, 2006

Pawnee Transloading Company, Inc. is found to be covered under the Acts by the majority of the Board due to its purchase of the assets of LeGere Investors, Inc. LeGere Investors, Inc. unloaded coal for Kincaid Generation, LLC and Reed Minerals. There is no indication that as a result of the purchase, any of the existing operations and agreements between the unloading operation and its customers were changed. I disagree with the majority of the Board in its analysis of the CSX Intermodal decision. Specifically, the railroad did not begin the coal unloading business. It was independently operated and therefore would exist regardless of whether the railroad or its affiliate had an interest in the operation. While it can not be argued that the parent company of the railroad will profit from owning the unloading business, this certainly does not necessitate the finding of providing service in connection with transportation.

Original signed by:

Jerome F. Kever
Management Member